No. 20380

United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, EVA SMITH, HARRY SMITH, LILLIAN G. FISHER, BARBARA MCGALLIAND, DORIS ROGERS, GAIL R. GREGG, RICHARD L. WALTON, HEIR OF SUE M. WALTON, AND DONALD WOOD,

APPELLANTS,

v.

APPELLEE.

STATE FARM FIRE AND CASUALTY COMPANY,

BRIEF FOR APPELLEE STATE FARM FIRE AND CASUALTY COMPANY

Interlocutory Appeal from Order Denying Motion to Dissolve Restraining Order of the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, JUDGE

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APPELLEE'S BRIEF

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STATEMENT OF THE CASE

The appellee adopts the statement of the case as contained in appellants' brief under "Summary of Facts" except that personal service by mail was obtained upon the defendants who are residents of Canada. It should also be noted that personal service was obtained upon the appellant Donald Wood by the United States Marshal for the Northern District of California on the 19th day of October, 1965.

SUMMARY OF ARGUMENT

The District Court did not commit any error of law when it concluded that there was proper jurisdiction over this cause and the appellants herein.

A. The District Court has jurisdiction over the subject matter in an action in the nature of interpleader.

B. The District Court has jurisdiction over all defendants, all prospective claimants.

C. Personal service of the prospective claimants of the fund can be obtained under the provisions of Rule 4 (e) and (i) of the Federal Rules of Civil Procedure to support the injunctive relief granted by 28 USCA 2361.

1. The service by registered mail of the Canadian defendants pursuant to rule 4 (i) FRCP constituted personal service upon these defendants.

2. The provisions of Rule 4 (i) FRCP are specifically supplementary to the provisions for service of process set forth in 28 USCA 2361.

ARGUMENT

A. This is a civil action brought in the nature of an interpleader. That the District Court has jurisdiction over such a civil action is apparent. 28 USCA 1335 provides:

> "(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the

nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment of the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the cleark of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"'(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

The district court of the judicial district in which a civil action in the nature of interpleader under 28 USCA 1335 may be brought is prescribed definitely. 28 USCA 1397 provides:

"Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judical district in which one or more of the claimants reside."

The appellee insurance company, being threatened with a multiplicity of suits and double vexation even though it denies

coverage under its policy for the particular loss, had the right to assert the remedy afforded it under 28 USCA 1335 by filing in the District Court a bill in the nature of interpleader. This method has been considered and approved many times.

Pan American Fire & Casualty Co v Revere,
188 F Supp 474 (1960)
Commercial Union Ins Co of New York v Adams,
231 F Supp 860 (1964)
Massachusetts Bonding & Ins Co v City of St. Louis
109 F Supp 137 (1952)
New York Life Ins Co v Lee,
232 F2d 811 (1956)
Denham v LaSalle-Madison Hotel Co,
168 F2d 576 (1948)

The Court, in the *New York Life Ins. Co.* case, stated at page 814:

> "Section 1335 adequately provides for interpleader for the protection of the insurance company and for the preservation and protection of the rights of the adverse claimants. The jurisdiction granted to the district court is not limited to an action of strict interpleader, but the provision is that the court shall also have jurisdiction of an action 'in the nature of interpleader'. See also Rule 22 F.R. Civ. P., U.S.C.A. This means that it was not required that the insurance company be a mere stakeholder having no claim or interest in the fund or property in dispute; but it might maintain its suit under the statute while still averring that it was not liable in whole or in part to any or all of the claimants."

B. The District Court has jurisdiction over all of the defendants, all possible adverse claimants.

It is apparent, under the statutory authority which forms the basis for the institution of a civil action in the nature of interpleader, that the District Court may issue its process to all claimants and also enter its order restraining them from instituting and proceeding in any State or United States court. 28 USCA 2361 provides:

"In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in the State or United States court affecting the property, instument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."

It is evident that no distinction is made under the statute between residents and non-residents of the United States. Instead, the statute clearly authorizes service upon parties not an inhabitant of the state in which the district court is held. It states specifically that a "district court may issue its process for all claimants" and to restrain them from any proceeding "in any state or United States court".

The order to show cause entered by the District Court in this case on the 22nd day of January, 1965, was in fact directed to all claimants, which included residents and non-residents of the United States. The order provided in part:

"You, and each of you, are hereby ordered, within 10 days of service upon you of this order if served within the district of this court, or within 20 days if served within any other federal court district, or within 30 days if served outside of the United States,"

Appellants did, by their interpretation, limit jurisdiction in an interpleader action to only those cases where all the claimants can be served by a United States marshal. This, obviously, is not the intent or purpose of the statute authorizing civil actions of interpleader or in the nature of interpleader. Many are the cases

in which non-residents of the United States have been made parties to civil actions of interpleader:

Republic of China v American Exp Co,
108 F Supp 169 (1952)
San Rafael Compania Naviera S.A. v American Smeltering & Refining Co.,
327 F2d 581 (1964)
Kredit Pank v Chase Manhattan Bank,
155 F Supp 30 (1957)

C. The general principle cited by the appellants to the effect that interpleader is an in personam proceeding need not be argued. The power of the District Court has been set out in 28 USCA 2361.

1. Appellants present the argument that since interpleader is an in personam proceeding, personal service of the defendants is essential to the jurisdiction. Personal service has been obtained. Appellants are attempting to confuse personal service or in personam jurisdiction, with service of process which requires delivery by hand. Rule 4 (e) FRCP provides:

> "Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

Rule 4 (i) (1) FRCP provides:

> "When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service."

The recent amendments of Rule 4 FRCP have been construed by the Supreme Court of the United States in *Hanna v Plumer,* 85 S Ct 1136, 14 L Ed2d 8, wherein the provisions for personal service under Rule 4 FRCP were challenged. The Supreme Court, taking certiorari in order to have conformity within the federal courts, stated at page 1139:

> "Actual notice is of course also the goal of Rule 4 (d) (1); however, the Federal Rule reflects a determination that this goal can be achieved by a method less cumbersome than that prescribed in §9. [requiring delivery by hand]."

Appellants' argument is based upon the supposition that personal service is only achieved by delivering the service upon the

party to be served by hand. Contrary to this premise there is adequate authority to support the position that personal service can be achieved by mail. *State v Pierce,* 100 NW2d 137, 257 Minn 114 (1959).

In personam jurisdiction of the defendants who are Canadian residents has been obtained pursuant to the conditions of Rule 4 (i) FRCP and consequently the Court has the jurisdiction to restrain these defendants.

2. Appellants next urge that 28 USCA 2361 is the exclusive provision for service and since the cited section does not provide for service in a foreign country, there is no method available for the appellee to obtain service in a foreign country. Appellee obtained service of the defendants who were residents of the foreign country pursuant to the provisions of Rule 4 (i) FRCP. The use of the methods available under the Rule 4 (i) FRCP has been challenged and upheld. *Hoffman Motors Corp v Alfa Romeo,* 244 F Supp 70 (1965); *Securities & Exchange Commission v Briggs,* 234 Supp 618 (1964). In the *Hoffman Motors* case the same argument that appellants present—the exclusive character of the statute permitting the process of the Federal District Court to extend beyond the geographical boundaries of the district—was urged. The Court found that Rule 4 (i) FRCP was supplementary and in addition to the statute which empowered the court to have effective process outside the district in which the court sat. In the *Securities & Exchange Commission* case the Court held that a service under Rule 4 (e) and (i) FRCP constituted in personam jurisdiction of a United States citizen served in Canada.

Rule 4 (e) and (i) FRCP appear for the first time in 1963. In the less than two years of their existence they have already been challenged in the Federal District Courts, the Courts of Appeals, and the United States Supreme Court on the grounds that the appellants here present. Whenever challenged, they have been upheld as establishing in personam jurisdiction and as a supplementary and additional methods of obtaining jurisdiction.

CONCLUSION

For the reason set forth hereinabove, the District Court would have jurisdiction over the subject matter and over the persons of all defendants, and in personam jurisdiction of the appellants was obtained in the manner provided under Rule 4 (e) and (i) FRCP, and the order denying the motion to dissolve the restraining order was proper.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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